

WORKERS' COMPENSATION ADVISORY COUNCIL

**MINUTES ~ NOVEMBER 20, 1998 MEETING [10:00 A.M.]
710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Dale Sims

Voting members in attendance:

Mr. Carter H. Witt
Mr. Bob Pitts
Mr. Othal Smith, Jr.
Mr. Jack Gatlin

Nonvoting members in attendance:

Mr. Jerry Mayo
Ms. Jacqueline B. Dixon
Ms. Abbie Hudgens
Mr. Tony Farmer

Ex officio members in attendance:

Ms. Sue Ann Head, Assistant Commissioner of Labor
[designee for Commissioner Al Bodie]
Mr. Neil Nevins, Assistant Commissioner of Commerce & Insurance
[designee for Commissioner Doug Sizemore]

Also present:

M. Linda Hughes, Executive Director
David Wilstermann, Statistical Analyst

The minutes of the September 25, 1998 Workers' Compensation Advisory Council meeting were unanimously approved.

1. SECOND INJURY FUND

The Executive Director began by giving an historical overview of the Second Injury Fund and the premium tax. The first Tennessee workers' compensation statute was enacted in 1919 and provided if an employee had a prior permanent injury then the employee was entitled to compensation for disability resulting from a later accident without consideration of the earlier injury. That statute also provided workers' compensation insurers were subject to the same premium tax imposed on casualty or indemnity carriers. In 1923, the premium tax statute was amended to provide for a premium tax of 4%.

In 1945, the Second Injury Fund was created. Claims were limited to those in which the employee had prior permanent disability due to loss of or loss of use of hand, arm, foot, leg or eye and subsequent permanent total incapacity through loss or loss of use of another member. [In 1959, case law expanded the application to include back injuries.] The state treasurer was custodian of the fund, which was funded by payments from carriers equal to \$100 for each death case and \$10 for each case of permanent partial disability.

In 1961, the Second Injury Fund statute was amended to add the requirement that to receive benefits from the fund, the employer must be insured or qualified as self-insured. In 1973, the statute was further amended to require an employer to establish by written records that the employer had knowledge of the pre-existing physical disability at the time the employee was retained. In 1975, the amount of money to be paid by each carrier was increased to \$150 for death cases and \$15 for each permanent partial disability case. In 1980, the superintendent of the division of workmen's compensation replaced the state treasurer as custodian of the fund. In 1983, the "superintendent" was changed to "director" and the carriers were required to make semi-annual payments to the fund.

In 1985, major revisions of the Second Injury Fund statutes were enacted. This reform was the result of three years of work which began in 1982 when a special house study committee on workers' compensation created an advisory committee to study Tennessee workers' compensation law. The committee had issued a report in 1984 which formed the basis for a proposed revision of the workers' compensation laws. The report noted the law severely restricted the availability of the second injury fund to employers because it required permanent total disability as a result of the loss of or loss of use of another member. In other words, if the same member was subsequently injured, the Second Injury Fund was not available. The report noted employers hiring previously disabled persons would be greatly, if not primarily, concerned about re-injury or aggravation of the prior injury which was not covered by the second injury fund. Although the proposed legislation was passed by the General Assembly, the bill was vetoed by the Governor after the General Assembly had adjourned. In 1985, a nearly identical bill was introduced. Amendments were proposed by the administration and interested groups and a compromise bill was enacted. That bill, which was almost identical to the current statute, set forth two methods for recovery from the Second Injury Fund and provided portions of the premium taxes collected were to be used for funding the Second Injury Fund.

The Executive Director then introduced Ms. Pat Wall, General Counsel, Tennessee Department of Labor. Ms. Wall began her presentation by displaying a map showing the location of all the current, open Second Injury Fund cases in Tennessee, highlighting that a majority of cases were in East Tennessee. As of October 31, 1998 there were 815 pending cases against the Second Injury Fund. In areas where there are a large number of Second Injury Fund cases, the Department contracts with outside attorneys to defend the Fund as part of a pilot project. The remainder of the Second Injury Fund cases are handled by staff attorneys located in Knox County and in Nashville. Ms. Wall also stated attorneys for the State try to attend benefit review conferences when possible and are able to do some depositions by phone, attempting to be as prepared as possible.

Mr. Witt then asked Ms. Wall to identify the mission of the Second Injury Fund attorneys, from the Department's standpoint, philosophically. Ms. Wall replied that their mission was to protect the Fund, to see that it is used for what it was intended to be used for, to make sure no one was defrauding the Fund, to assure there was no collusion between the plaintiff's attorney and the employer's attorney and to assure the proper ratios are attributed to the Fund.

Mr. Smith asked whether, in the end, it is a matter of medical proof in a case which determines how much is attributable to the Fund. Ms. Wall responded in the affirmative and indicated the Fund attorneys are now utilizing the testimony of vocational experts, especially in the rural counties. Mr. Mayo asked if the lack of the ability to put injured workers back to work is the cause for the disparity between East Tennessee and the rest of the State. Ms. Wall replied she did not know if that was the reason.

Mr. Farmer then inquired as to why the Second Injury Fund has an arbitrary policy about settling cases. Ms. Wall responded she was not aware they had an arbitrary policy and stated the Second Injury Fund does not have settlement authority as settlements must be approved by the Attorney General, the Comptroller and the Governor. She also stated the Second Injury Fund attorneys attend as many benefit review conferences as they can and make recommendations for settlements if they see a savings of 15% or more but that the State is usually better off going to court. Mr. Farmer indicated he thought this was an arbitrary position which puts the employers in a very high risk situation when they are in a position to settle a case but because the Fund will not consider settlement, the employer remains exposed. Ms. Wall replied it is a statutory requirement that all settlements must go through the Attorney General's office and that the Fund attorneys recommend settlement any time that there is a 10-15% savings to the Fund.

Mr. Smith asked what the 10-15% savings was based on. Ms. Wall replied that it was based on medical testimony and the impressions of the attorneys as to how much the trial courts are going to award. Mr. Smith then noted in clarification of Mr. Farmer's statements, that by not settling cases, and forcing them into trial, the Fund is giving an overall larger recovery than might be achieved by compromising and settling which is ultimately to the detriment of the employer and the Fund.

Mr. Mayo asked why settlement authority was retained at the Attorney General's office. Ms.

Wall and Mr. Smith replied that it was by required by statute. Mr. Farmer then inquired as to why someone in the Attorney General's office had to sign off on a case when the attorney who has taken the depositions, has the medical proof and has met the plaintiff is in the best position to evaluate the settlement posture of the Fund. Mr. Smith then asked Ms. Wall at what point someone from the Second Injury Fund evaluates a case and puts a settlement figure on it. She replied they are reviewing the file throughout the case and it is probably at the benefit review conference, right before the trial.

Mr. Sims then asked Ms. Wall to go explain the process by which the State gets involved in a Second Injury Fund case. Ms. Wall stated that when a person has a prior court award or a previous injury the Director of Worker's Compensation is served through the Attorney General's office, who signs off on the summons and it is sent over to the general counsel of the Department of Labor and the case is assigned to an attorney for defense. Mr. Witt asked if the plaintiff was the only one who can sue the Second Injury Fund or whether the defendant can do so. Ms. Wall replied it is generally the plaintiff who sues unless it is a jump suit, where the employer files the case.

Mr. Smith asked whether someone can get a contribution to a settlement from the Second Injury Fund without filing a suit. Ms. Wall replied she did not think that had ever come up, however she assumed they would wait to be served. Mr. Smith noted this sounded as if the Fund is encouraging litigation.

Mr. Farmer added the Second Injury Fund does not even participate in benefit review conferences. The employer is required to have someone there with the authority to settle and the employee is required to have someone with the authority to settle, but the Second Injury Fund does not even have anyone with the authority to settle. Discussion continued as to whether the State needs to be sued before it can be brought into a case. Ms. Wall replied that if they are not paying out money, they are not going to do anything to speed that up. Mr. Witt then asked if the Second Injury Fund obtains medical testimony just to determine apportionment, not whether there was injury and to what degree. Ms. Wall replied that they get medical testimony to determine everything and that medical testimony is all that they can rely upon.

Mr. Sims requested that Ms. Wall have someone report back to the Advisory Council regarding the Second Injury Fund and benefit review process, specifically related to the question of whether the State has to be sued in order to participate in a benefit review conference. Mr. Pitts requested that the Attorney General's office be included in this inquiry. Mr. Sims also asked Ms. Wall if anyone knows the value of judgments to be paid out by the Second Injury Fund and if anyone has placed a value on pending cases against the Fund. Ms. Wall did not have this information. Ms. Hughes indicated she would address this issue later in the meeting.

Mr. Andy Bennett, Chief Deputy, Attorney General's office, was introduced. Mr. Bennett then introduced Ms. Katie Stratton, Assistant Attorney General and made a presentation as to how Second Injury Fund cases are appealed by the State. First, the Department of Labor sends a memo to Ms. Stratton and Ms. Dycus in the Attorney General's office, indicating that they want to appeal a case, giving reasons as to why they feel an appeal is appropriate. The memo is reviewed and an appeal recommendation is sent to the Solicitor General, Mr. Mike Moore. The Solicitor General then makes

a decision on whether to appeal, giving consideration to whether there an important principle of law involved, the facts of the case, and the likelihood of success. If an appeal is authorized, a notice of appeal is filed and the record goes to the Supreme Court. The other side has 30 days to file a reply brief and the case is heard in due course. Mr. Witt asked how long this process usually is and Mr. Bennet replied that an appeal must be filed within 30 days from the time the decision being appealed was rendered and it then takes the Supreme Court three to four months to render an opinion.

Mr. Smith asked what percent of the cases appealed by the Attorney General's office are over apportionment. Ms. Stratton replied that when they are the appellant, it is usually over apportionment. Mr. Sims then asked Mr. Bennett if he had any statistics as to what the different appellant issues are and what their success rates are for those cases which are appealed. Mr. Bennett replied that he thought they win more than they lose, and that they would be happy to report back to the Advisory Council with more exact figures. Mr. Smith asked that information be provided regarding permanent total cases which are appealed by the Attorney General due to apportionment, the final outcome and where these cases are occurring.

Mr. Sims asked Mr. Bennett to comment on settlements with the Second Injury Fund. Mr. Bennett explained a statute requires in every case against the State of Tennessee that any settlement must be approved by the Attorney General, the Comptroller of the Treasury, and the Governor. Each entity takes settling very seriously and may have questions regarding the settlement, creating a lot of dialog for each case.

Mr. Pitts, after stating that no one was being critical of the Attorney General's office, asked rhetorically, whether the effect of the circumstance with the Attorney General's involvement in settlement approvals means, in reality, that there are no settlements through the benefit review process or anything involving potential abuse of the Second Injury Fund which does not wind up in court. He questioned whether this was in the best interest of public policy.

Mr. Sims inquired whether Mr. Bennett was aware if anything was being considered regarding a review of the State's settlement process. Mr. Bennett replied that the statutory provision for the State's settlement procedure has been in place for many years. Mr. Mayo requested that this be looked into. Mr. Sims noted the Advisory Council could certainly look into the matter but explained the process was one which provided a check and balance among all three branches of government.

Mr. Witt then asked whether, if the Fund were truly funded and a specific amount of money set aside, authority could be granted to the Treasurer's office or to the Department of Labor to settle cases. Mr. Sims replied he did not think the financing mechanism would make any difference. Mr. Nevins added that payments from the Guaranty Fund also require the approval of all three individuals.

Mr. Farmer stated he has settled State of Tennessee employee workers' compensation claims without going through the Attorney General, Comptroller, and Governor. The case settlement is worked out through Sedgwick James, the claims adjusting facility for the State. Mr. Sims explained that the Governor and Comptroller on recommendation of the Attorney General delegated authority

to the Treasurer to settle State employee claims. He indicated giving the same authority to settle Second Injury Fund claims could be looked into to determine if the State would be comfortable with that delegation of authority.

Mr. Witt stated it would appear if there were an established sum of money set aside for the Second Injury Fund then authority to settle could be delegated to the administrator of the Fund. Mr. Pitts expressed concern that although the Workers' Compensation reform act was designed to encourage settlement without litigation in cases involving the Second Injury Fund, the State is, in effect, delaying people receiving money that they are due. He felt there should be some method established whereby the Second Injury Fund would be able to settle claims in the benefit review process without court involvement and was interested in how this could be accomplished.

Mr. Farmer added that if the benefit review process was working ideally, the injured worker could contact the Department of Labor without having an attorney. He expressed concern that no one would inform the employee of the potential for Second Injury Fund involvement. Mr. Witt stated he thought informing injured workers about the Second Injury Fund would be part of the duties of a Benefit Review Specialist and also that it would behoove the employer to get the Second Injury Fund involved. Mr. Smith added information concerning potential Second Injury Fund involvement should be made available to the employee before the benefit review conference as this would be too late in the process. He suggested something could be added to the notice which the Department of Labor sends to the claimant which would advise the worker regarding the possibility of a claim against the Second Injury Fund.

Mr. Sims then asked the Advisory Council staff to review the mediation process to identify the obstacles to allowing mediation of Second Injury Fund cases in benefit review conferences and to propose alternatives or to identify possible solutions.

The Executive Director then directed the members of the Advisory Council to two documents related to the Second Injury Fund. The first documented the total premium taxes collected and the budget for and expenditures from the Second Injury Fund for fiscal years 1991-92 through 1997-98. The second outlined the outstanding financial obligation of the Second Injury Fund as of July 1, 1998.

Ms. Hughes explained that premium taxes are collected from self-insured employers, insurance companies [the tax is calculated on premiums, not on deductibles], Tennessee counties who have elected to participate in the Second Injury Fund and Tennessee municipalities who have elected to participate in the Fund. The premium taxes become part of the general fund and are not set aside in a specific account for only Second Injury Fund payments. By statute up to fifty percent of the premium taxes collected [excluding the .4% TOSHA premium surcharge] are available for allocation to the Fund. Each fiscal year, there is a specific budgeted amount for the Second Injury Fund and if the expenditures exceed the budgeted amount then additional money is transferred from the General Fund to cover the Fund liability for that year. Ms. Hughes reported the total outstanding Second Injury Fund obligation as of July 1, 1998 totaled \$12,876,706.70.

2. REPORT OF THE DEPARTMENT OF COMMERCE & INSURANCE

Mr. Neil Nevins, Assistant Commissioner of Commerce and Insurance, was introduced. Mr. Nevins stated the Commissioner of Commerce and Insurance took the Advisory Council's recommendation and approved a 9.0% reduction in the loss cost. NCCI has been notified and they have modified the filing and it is on file at the Department. Mr. Nevins then updated the Advisory Council on the problem with data collection from USF&G. He stated the problem resulted from two agreements that USF&G had entered into with Hartford Fire Insurance Company. One was that Hartford was to take over all policy routing and claims administration from 7/1/96 forward and two, Hartford had agreed to take over claims administration for the assigned risk plan claims that were open as of 10/1/96. The problem rose out of the integration between the loss data of Hartford and USF&G. They have indicated all problems will be corrected by the end of the year.

3. REPORT ON 1996-1997 TRIAL DATA

Mr. David Wilstermann, Statistical Analyst, Workers' Compensation Advisory Council, was introduced. Mr. Wilstermann then presented a summary of the Advisory Council staff's research on permanent partial disability judgments for 1996 and 1997 Tennessee workers' compensation trials.

A representative sample from each of the 31 Judicial Districts in Tennessee was obtained resulting in a sample size of 1,115 trials in which the alleged work-related injury occurred after August 1, 1992. He noted, as an underlying comment, that the data was virtually unchanged from the draft report of 1996 Workers' Compensation Trial Judgments presented to the Advisory Council in May, 1998.

Mr. Wilstermann presented the following summary of data to the Advisory Council:

TRIAL INFORMATION

Number and percent of cases tried by a judge	1115	3.7%
Number and percent of body as a whole cases	646	58.8%
Number and percent of scheduled member cases	460	40.2%
Average time between accident/injury and trial date	2 years 2 ½ months	

DEMOGRAPHIC INFORMATION

Average age of the injured workers		41.7 years
Level of Education (Number and Percent)		
Less than high school education	234	33.8%
High school education only	322	46.5%
College degree	26	3.7%
Average weekly compensation rate		\$263.88
Number and percent of cases where employee received maximum weekly benefits (comp rate)	231	20.7%

CASE INFORMATION

Ten most frequently occurring injuries		
Back (includes back strains, sprains, herniated discs, etc.)	373	34.2%
Leg	132	12.1%
Bilateral Carpal Tunnel	129	11.8%
Shoulder	97	8.9%
Arm	76	7.0%
Neck	74	6.8%
Carpal Tunnel (one arm)	46	4.3%
Hand	23	2.1%
Head/Face	23	2.1%
Foot	20	1.8%
Average number of physicians per trial		1.9

	mean	median
Average highest permanent partial impairment ratings		
Body as a Whole	13.8% PPI	10.0% PPI
Scheduled Member	13.8% PPI	10.0% PPI
Average permanent partial disability awards		
Body as a Whole	32.7% PPD	25.0% PPD
Scheduled Member	37.2% PPD	33.0% PPD
Average permanent partial disability judgment amounts		
Body as a Whole	\$34,683.44	\$25,665.50
Scheduled Member	\$23,529.36	\$18,682.45
Average PPD multipliers*		
Body as a Whole Return to Work	1.94	2.00
Scheduled Member Return to Work	3.47	2.73
Body as a Whole No Return to Work	3.74	3.75
Scheduled Member No Return to Work	3.84	3.00

* PPD multiplier is the ratio of the average highest PPI given to the PPD% awarded.

Frequency and percent of permanent total cases

West Tennessee (Judicial Districts 24-30)	22	7.1%
Middle Tennessee (Judicial Districts 12-23+31)	7	1.6%
East Tennessee (Judicial Districts 1-11)	28	7.5%

Frequency and percent of Second Injury Fund cases

West Tennessee (Judicial Districts 24-30)	25	8.1%
Middle Tennessee (Judicial Districts 12-23+31)	10	2.3%
East Tennessee (Judicial Districts 1-11)	30	8.0%

At the conclusion of his presentation, Mr. Wilstermann stated the only two variables where differences between Judicial Districts were statistically significant were average weekly compensation rates, and PPD multipliers for scheduled member trials where the employee returned to work. Mr. Wilstermann explained that after reading over 1000 case files it was his impression some judges are applying a 2.5 times multiplier cap to scheduled member injuries [as required for body as a whole trials where the employee returns to work] while other judges are not although there are no statutory requirements for capping scheduled member judgments.

4. REPORT FROM THE EXECUTIVE DIRECTOR

Ms. Hughes explained the packets of materials received by Advisory Council members contained a copy of the final version of the Department of Labor's statistical data form SD1 along with its instructions. Also included in the packets was a schedule of Advisory Council meetings for 1999. Mr. Sims stated the meeting dates were scheduled around the Legislature and if meetings proved unnecessary in the March, April, early May time periods, the meetings would be canceled.

Mr. Nevins stated if any future changes are made in form SD1, he would like a line added around item #38 asking for the insurance company's NAIC number. All insurance companies have a five digit NAIC number and if the Department of Labor and the Department of Commerce and Insurance ever integrate their systems together having the NAIC number would make integration easier.

Ms. Hughes also stated a copy of the quarterly budget report for the Advisory Council was included in the materials received by the members. Mr Sims added it was Mr. Adams' intent for the Advisory Council to have quarterly budget reports so the members know what the budget is and where the money is being spent.

Mr Sims recognized Terri Robinson of NCCI who made the announcement that NCCI had gone through a reorganization and she had taken a position in national affairs, therefore she would no longer be the Tennessee representative.

There was no further business to come before the Advisory Council and the meeting was adjourned at 12:15 p.m.